No. 10266

In the United States Circuit Court of Appeals for the Ninth Circuit

LA VERNE COOPERATIVE CITRUS ASSOCIATION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA. CENTRAL DIVISION

BRIEF FOR THE UNITED STATES OF AMERICA

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OPINION BELOW

The unreported opinion of the District Court, together with its findings of fact and conclusions of law, is set forth in the record (R. 64, 248).

JURISDICTION

The judgments of the District Court in the five cases here on appeal were entered April 29, 1942 (R. 80, 92, 95, 98, 101). Notice of appeal in each case was filed July 27, 1942 (R. 298–302). The jurisdiction of this Court rests upon Section 128 of the Judicial Code, 28 U. S. C. (1940 ed.) 225.

CONSOLIDATION OF APPEALS

The five cases on appeal present substantially the same questions of law. They were consolidated for

trial below (R. 104), and have been consolidated on appeal by order of this Court (R. 322–325). The record contains a full transcript only of the proceedings in the *La Verne* case, which is typical of all the cases, and only excerpts from essential proceedings in the other cases.

THE JUDGMENTS IN THE DISTRICT COURT AND THE STATUTE UNDER WHICH THE JUDGMENTS WERE ENTERED

The judgments of the District Court from which the appeals are taken enjoin the appellants, with certain qualifications hereinafter mentioned, from handling lemons in violation of Order No. 53, "Order Regulating the Handling of Lemons Grown in the States of California and Arizona." The lemon order was issued by the Secretary of Agriculture of the United States pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. (1940 ed.) 601 *et seq.* The Act reenacted, with amendments, many of the provisions of the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended from time to time, including the amendments of August 24, 1935, 49 Stat. 750.[1]

The judgments were entered in an action instituted by the United States of America under Section 8a (6) of the Act. This section confers jurisdiction upon the District Courts to entertain enforcement proceedings to restrain handlers subject to any order issued under the Act from violating the provisions of the order.

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[1] References in this brief are to sections of the Agricultural Adjustment Act of 1933 as amended, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

At the time of the entry of the judgments there was pending in the District Court an action instituted by the appellants under Section 8c (15) (B) of the Act for judicial review of a ruling of the Secretary of Agriculture denying a petition filed with him by the appellants under Section 8c (15) (A) of the Act, in which the appellants contended that the lemon order was not in accordance with law, and asked to be exempted from the operation thereof. The injunctions against the appellants are, by their terms, to continue in force only until a final judgment is entered by the District Court in the review proceedings.

THE OPINION OF THE DISTRICT COURT

The District Court held that if the lemon order was valid on its face the only issue properly before it was whether the appellants had violated the provisions thereof, and that all other issues were appropriately triable only in the review proceeding. The court accordingly refused to receive and consider evidence offered by the appellants in support of their affirmative defenses charging that the lemon order discriminates against them and violates due process of law generally and particularly as applied to them (R. 248–255).

QUESTIONS PRESENTED

1. Whether the appellants, in this enforcement proceeding against them under Section 8a (6) of the Act, are, by virtue of the administrative and judicial review provided for in Section 8c (15) of the Act, limited solely to the issues of the fact of violation of the lemon order and the validity of the order *on its face?* Ap-

pellants contend that, if they are so limited, the Act in that respect is unconstitutional.

2. Whether, in the event it is held herein that issues relating to the validity of the lemon order may be raised by the appellants in this proceeding, the evidence proffered by the appellants and excluded by the District Court is sufficient to establish the invalidity of the order?

STATEMENT OF THE CASE

A. The Act and the lemon order

1. Generally

The Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 1940 ed. 601 *et seq.*) directs the Secretary of Agriculture to issue, under conditions and in the manner prescribed in the Act, orders regulating the handling of specified commodities, including lemons, where such handling is in interstate or foreign commerce or directly burdens, obstructs, or affects such commerce (Act, Sec. 8c (1)). Section 8c (6) of the Act authorizes, *inter alia,* the inclusion, in orders applicable to fruits, of provisions regulating the quantity of fruit which may be marketed by all handlers thereof during any period, and the quantity which each handler may market during any period based upon the quantity which the handler has available for current shipment or, in the discretion of the Secretary, upon the quantity shipped by the handler during a prior representative period.

2. The issuance of the lemon order upon evidence taken at a public hearing

Pursuant to the authority granted by the Act, the Secretary of Agriculture during the fall of 1940 held

a public hearing, known as a promulgation hearing, with respect to a proposed order regulating the handling of lemons grown in the States of California and Arizona. All interested persons, including the appellants, were given notice of the hearing. The appellants attended, and were afforded an opportunity to be heard but were not permitted directly to cross-examine witnesses (R. 9, 26).

The Secretary on April 5, 1941, issued Order No. 53 (7 C. F. R. 953.1 *et seq.*), which became effective April 10, 1941 (R. 10, 26). As required by Section 8c (4) of the Act, the order was based upon evidence taken at the promulgation hearing (R. 67).

3. The provisions of the lemon order

The lemon order provides that the Secretary, upon the recommendation of the Lemon Administrative Committee, which is charged with the administration of the order, and the organization of which is provided for in the order, may limit the total quantity of California-Arizona lemons which all handlers may market in interstate commerce or in commerce with Canada during any week (Order, Sec. 953.4 (b), (c)). This total quantity is allotted among handlers in accordance with a "prorate base" for each handler which is determined bi-weekly by the Secretary, also upon recommendation of the Committee. The "prorate base" is the ratio which the quantity of lemons of each handler "available for current shipment" bears, at two-week intervals, to the total quantity of lemons available for current shipment from California and Arizona (Order, Sec. 953.4 (d), (e)).

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The quantity of lemons which each handler has available for current shipment is measured by the quantity of lemons which each handler has picked from the trees and has assembled at an established shipping point within the area of production. However, if a handler shows the unavailability of facilities for storing or otherwise assembling, he may, nevertheless, have the quantity of his available lemons computed in an alternative manner and his prorate base determined accordingly (Order, Sec. 953.4 (d) (3), (5)).

A handler is permitted to exceed his weekly allotment by ten per centum or one carload, whichever is greater, but the allotment for the next succeeding week is reduced commensurately with the excess so handled. If a handler's allotment for any week is not filled, the unused portion may be carried over by the handler to the next succeeding week only. Allotments may be lent by one handler to another, subject to conditions specified in the order (Order, Sec. 953.4 (f), (g), (h)).

4. The provisions of the Act for administrative and judicial review

The Act provides, in Section 8c (15) (A), that any handler subject to an order who feels that all or part of an order, or any obligation imposed in connection therewith, is not in accordance with law, may file a written petition with the Secretary for a modification thereof or exemption therefrom. He must be granted a hearing upon the petition, after which the Secretary shall make a ruling thereon, and his ruling is final if in accordance with law.

In Section 8c (15) (B) of the Act, jurisdiction is conferred upon the District Courts of the United States to review the Secretary's ruling upon the filing of a bill in equity for that purpose by the handler. If the court determines that the Secretary's ruling is not in accordance with law, it is empowered to remand the proceedings to the Secretary with directions either to make such ruling as the court determines is in accordance with law, or to take such further proceedings as in the court's opinion the law requires.

5. The enforcement provisions of the Act

By Section 8a (6) of the Act, the District Courts are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating, any order issued by the Secretary pursuant to the Act. And it is expressly provided in Section 8c (15) that the pendency of review proceedings thereunder shall not impede, hinder, or delay the United States or the Secretary from obtaining relief pursuant to Section 8a (6). Enforcement proceedings abate whenever a final decree has been rendered in review proceedings between the same parties, and covering the same subject matter (Act, Sec. 8c (15) (B)).

B. The proceedings in the District Court

1. The complaints

The complaint of the United States against each of the appellants recited past overshipments of lemons in violation of the lemon order and sought to enjoin further shipments of lemons in excess of the weekly

allotments (R. 7, 20–21). The complaint in each case was filed pursuant to Section 8a (6) of the Act.

The District Court found, as alleged in the complaints, that the lemon order was issued in compliance with the provisions of the Act (R. 8–10, 66–70) and that each of the appellants had violated the provisions of the lemon order in shipping lemons in excess of weekly allotments (R. 13–17, 71–73). The appellants do not dispute these findings (Appellants' Brief, p. 6).

The complaint in paragraph twenty-four alleged, and the court found, that further violations by the appellants of the lemon order would have an injurious effect on interstate commerce and would be inimical to the successful operation of the Act and the order (R. 18–20, 73). The appellants denied this allegation of the complaint (R. 42), and take issue with this finding of the court as being without support in the evidence (R. 297 and Appellants' Brief, p. 22). It is submitted by the appellee that the allegation and the finding are surplusage, and they were so regarded by the court below (R. 139).[2]

2. The special defenses, stipulations of facts, and proffers of proof

The appellants, in their several answers, contend that the lemon order discriminates against them and violates due process of law generally and particularly in its application to them (R. 33–51). The appellants sought to support these affirmative defenses by show-

[2] This is in accord with the views expressed by this Court in *American Fruit Growers* v. *United States*, 105 F. (2d) 722, 725 (C. C. A. (9th) 1939), involving an orange and grapefruit order issued under the Act.

ing the general nature of the lemon industry and the effect of the order upon their businesses. The facts relating to the general nature of the lemon industry are contained in stipulations between the parties (R. 118, 129). The evidence relating to the effect of the operation of the order upon the businesses of the appellants is contained in proffers of proof made by the appellants (R. 154–242). The court declined to consider the special defenses and to admit the evidence contained in the proffers of proof.

Generally speaking, the proffers are intended to show that, if the appellants continue their present manner of doing business, they will be adversely affected by the lemon order. It is the purpose of the evidence to prove specifically, in addition to the economic unwisdom of the order, (1) that the appellants cannot operate under the order without providing additional storage facilities; (2) that the appellants' sales are largely on private orders of an established trade, whereas the majority of other handlers sell largely in the auction markets, and, consequently, the appellants lose customers to such handlers, most of whom are members of the California Fruit Growers Exchange, whenever it happens that their allotments under the lemon order are insufficient to fill their trade orders; and (3) that appellants handle many tree ripe and other lemons which have a short storage life and which, in order to prevent spoilage, must be moved to the market before other types of lemons with a longer storage life.

3. Findings of fact

The District Court made findings of fact which were limited to the material allegations and some of the unnecessary allegations of paragraph twenty-four of the complaint. The court also found that there was pending before the Secretary, at the time of the commencement of the case at bar, a petition of the appellants for administrative relief under Section 8c (15) (A) of the Act (R. 71). The court did not make any finding with respect to any of the special affirmative defenses interposed by the appellants.

SUMMARY OF ARGUMENT

A. The provisions of the Agricultural Marketing Agreement Act of 1937 for administrative and judicial review of a marketing order issued by the Secretary of Agriculture and for enforcement of the order by the United States manifest a clear intention to confine the enforcement proceedings to the issues of the validity of the Act and order on their face, and of the fact of violation.

B. The appellants are not, in the circumstances of this case, deprived of due process of law by the injunction against violations pending final judgment by the District Court in the action instituted by them to review the ruling made by the Secretary of Agriculture on their petition for exemption from the operation of the lemon order. A stay *pendente lite* is a matter of administrative and judicial discretion, not of right.

C. The District Court did not err in refusing to consider the special affirmative defenses of the appellants or to admit the evidence proffered in support thereof.

But even if there was error, such error is not a ground for reversal, as the evidence does not demonstrate the invalidity of the lemon order.

D. The question of the economic unwisdom of the lemon order is for legislative or administrative and not judicial determination.

E. The evidence proffered by the appellants in support of their special affirmative defenses does not show discrimination against them in the operation of the lemon order. The evidence does not show that the appellants are treated differently from other handlers subject to the order. Nor does such evidence show any attempt on the part of the appellants to alleviate their alleged hardships by invoking the special machinery provided by the order for the benefit of handlers without storage facilities. The Fifth Amendment to the Constitution, unlike the Fourteenth Amendment, does not protect against discriminaton.

ARGUMENT

I. Evidence proffered by the appellants in support of their special defenses was properly excluded

A. The trial court merely followed the direction of the Act

When Sections 8a (6) and 8c (15) of the Act are read together, the statutory scheme carefully designed in the interest of orderly review and prompt enforcement becomes apparent. Under Section 8c (15) any person, including appellants, affected by an order is afforded an administrative hearing and a judicial review at which he may obtain such interlocutory and permanent relief as he may be entitled to by law. Section 8a (6) confers jurisdiction on

the District Court specifically to enforce orders and to enjoin violations thereof. Having provided in Section 8c (15) an orderly procedure for obtaining judicial review of questions pertaining to the order, the Congress should not be presumed to have intended that this procedure might be circumvented in the course of proceedings under Section 8a (6). Such an interpretation would violate the canons of statutory construction and conflict with fundamental rules of administrative law requiring exhaustion of the administrative remedy as a condition of resort to the courts.

Any interpretation of Section 8a (6) as permitting a plenary proceeding in which all questions pertaining to an order may be considered would be inconsistent with the interim nature of the relief to which the Government is entitled under that section. It is provided in Section 8c (15) that enforcement proceedings brought pursuant to Section 8a (6) shall abate when a final decree has been rendered in review proceedings between the same parties brought pursuant to Section 8c (15) and covering the same subject matter. If all questions may be raised and decided in the enforcement proceeding, it would be pointless to have the decree therein abate when a final decree is rendered in the review proceedings. A construction which would make the statute ridiculous is to be avoided.

It is expressly provided in Section 8c (15) that the pendency of review proceedings thereunder shall not impede, hinder, or delay the United States in obtain-

ing relief in the enforcement proceedings. If the contention of the appellants were to prevail that all questions pertaining to the order may be considered in the enforcement proceedings, different Federal courts of coordinate jurisdiction would be considering the same questions at perhaps the same time. Such a disorderly procedure would obviously be wasteful and costly. It would also render virtually meaningless the well recognized rule that in the judicial review of administrative action there is to be no trial *de novo* and that the administrative findings, if supported by substantial evidence, are not to be disturbed by the court even though, upon consideration of all the evidence, the court might reach a different conclusion—a rule which has been consistently applied by the District Courts in the review of rulings of the Secretary under Section 8c (15) (B) of the Act.[3] The

[3] *Queensboro Farm Products, Inc.* v. *Wickard*, 47 F. Supp. 206 (E. D. N. Y. 1942); *M. H. Renken Dairy Co.* v. *Wickard*, 45 F. Supp. 332 (E. D. N. Y. 1942); *Sauquoit Valley Farmers Cooperative, Inc.* v. *Wickard*, 45 F. Supp. 104 (N. D. N. Y. 1942); *Vogt's Dairies, Inc.* v. *Wickard*, 45 F. Supp. 94 (S. D. N. Y. 1942); *Fairview Creamery, Inc.* v. *Wickard*, 42 F. Supp. 757 (D. Me. 1942); *Crull* v. *Wickard*, 40 F. Supp. 606 (W. D. Ky. 1942); *New York State Guernsey Breeders' Co-op., Inc.* v. *Wallace*, 28 F. Supp. 590 (N. D. N. Y. 1939).

See also *National Broadcasting Co.* v. *United States*, — U. S. —, 63 S. Ct. 997, 1014 (1943); *Parker* v. *Motor Boat Sales*, 314 U. S. 244 (1942); *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105 (1942); *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546 (1942); *Gray* v. *Powell*, 314 U. S. 402, 411–412 (1941); *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126, 154–155 (1941); *National Labor Relations Board* v. *Link-Belt Company*, 311 U. S. 584, 596–597 (1941); *South Chicago Co.* v. *Bassett*, 309 U. S. 251, 257–258

rationale of this rule, as clearly stated by the Supreme Court, is that administrative and judicial bodies are to be regarded as related instrumentalities through whose coordinate action the public purpose of a regulation is to be realized. *United States* v. *Morgan,* 307 U. S. 183, 190–191 (1939), and *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U. S. 4, 15 (1942).

The statutory plan is clear. Section 8a (6) was designed for prompt enforcement, and the evidence in proceedings thereunder should be confined to the single question of violation. This is the only reasonable construction of the Act. Any other would put a premium on disobedience to law by rewarding violators of the order with a short cut to the judicial determination of the issues they seek to raise. The requirement of a first resort to, and exhaustion of, the administrative remedy would be by-passed.

It will sometimes happen, as in the contemporaneous proceeding of the appellants before the Secretary, that questions may arise as to the conduct of the administrative proceeding. It is submitted that all such questions must be resolved in the judicial review of the administrative ruling. See *Anniston Manufacturing Co.* v. *Davis,* 301 U. S. 337, 345, (1937); *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 50 (1938); *Newport News Shipbuilding & D. D. Co.* v. *Schauffler,*

(1940); *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304 (1937); *Chesapeake & Ohio Ry. Co.* v. *United States,* 296 U. S. 187 (1935); *Virginian Railway Co.* v. *United States,* 272 U. S. 658, 665 (1926).

303 U. S. 54, 57 (1939); *Lockerty* v. *Phillips,* — U. S. —, 63 S. Ct. 1019 (1943).

Finally, unless Section 8a (6) is construed restrictively, it must be regarded as surplusage. The general equity jurisdiction of the District Courts includes the power to enjoin violations of law, and Section 8a (6) can have no effect except as a limitation of the scope of proceedings brought to enjoin violations of an order. This was the view of the court below (R. 249).

The decisions rendered under this Act, and other acts with similar provisions, are in accord with the view taken by the District Court in this case. In the recent case of *United States* v. *Ridgeland Creamery Co.,* 47 F. Supp. 145 (W. D. Wis. 1942), the handler sought to raise as a defense to an action under Section 8a (6) of the Act matters properly triable in a proceeding under Section 8c (15). Judge Patrick T. Stone, in holding that the Court had no jurisdiction under Section 8a (6) to consider such matters, said:

> "... Where, as here, Congress has created a special administrative procedure providing for a review by the Secretary of Agriculture of the United States of actions and determinations of the Market Administrator, and which, as here, meets all requirements of due process, that remedy is exclusive, and this court has no jurisdiction to review the actions and determinations of the market administrator, except in proceedings under Section 8c (15) (B) of the Agricultural Marketing Agreement Act of 1937."

In *Bradley* v. *Richmond,* 227 U. S. 447 (1912, the defendant was prosecuted and convicted for engaging

in business without having first obtained a license conditioned upon payment of a graduated tax. He was not permitted to raise the defense that the tax against him was erroneous and discriminatory since he had not exhausted the administrative remedy provided by the statute.

Walling v. *Cohen,* 48 F. Supp. 959 (E. D. Pa 1943), was an action to restrain violation of a wage order promulgated under the Fair Labor Standards Act. (29 U. S. C. 1940 ed. 201 *et seq.*) The defendants attempted to show that the wage order had not been issued in accordance with law and was not valid in its application to their business. The Court refused to consider this defense on the ground that the Act provided an administrative procedure for attacking the validity of wage orders and the propriety of their application to particular operations, with judicial review of the administrative ruling. See also *United States* v. *Slobodkin,* 48 F. Supp. 913 (D. Mass. 1943); *United States* v. *C. Thomas Stores,* 49 F. Supp. 111 (D. Minn. 1943); and *Henderson* v. *Kimmel,* 47 F. Supp. 635 (D. Kan. 1942).

B. Appellants were not deprived of due process by the refusal of the trial court to consider the issues raised by the special defenses

The appellants argue that if they are enjoined from violating the lemon order without first being given an opportunity to present and have an adjudication of the constitutional issues raised by them, they are deprived of due process, since compliance with the order causes them great loss of profit which they will not be able to recoup in the event the order is ulti-

mately held invalid. In support of this argument, reliance is placed upon a number of cases, of which *Porter* v. *Investors Syndicate,* 286 U. S. 461 (1931), is typical. These cases are said to establish that where the enforcement of administrative action would cause a person affected irreparable damage if the action were finally invalidated, and where the provisions of the applicable statute preclude a supersedeas or stay pending final review, due process is not afforded.

The appellee does not regard the cases cited by this appellant as having application here. In the first place, the provisions of the Act do not preclude the Secretary from granting temporary relief from the operation of the order. It nowhere appears that appellants, or any of them, either in the Section 8c (15) proceedings instituted in their behalf or in any other proceedings, sought such relief. In *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300 (1937), it was held that failure to request a supersedeas or temporary stay, when it is available as an administrative remedy, will preclude a later application to the courts for such relief.

Even where timely application is made for temporary relief, the granting thereof is a matter of discretion, not of right. In *Virginian Railway Co.* v. *United States,* 272 U. S. 658, 672–673 (1926), the Court said:

> A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. *In re Haberman Manufacturing Co.,* 147 U. S. 525. It is an exercise of judicial discretion. The propriety of its issue is de-

> pendent upon the circumstances of the particular case.

The circumstances of this case are not such as would justify a stay and the District Court so determined in issuing the injunction herein complained of. It is obvious that the lemon order is unworkable unless all who are subject to it comply. The appellants cannot be exempted even temporarily from the provisions restricting shipments, for that would operate unfairly against all complying handlers and completely disrupt the operation of the order. The appellants constitute a comparatively small number of the total persons affected by the order, the vast majority of whom indicated their desire that it become effective. The order itself is part of a regulatory program enacted by Congress for the welfare of the nation as a whole. As said in *Philips* v. *Commissioner of Internal Revenue,* 283 U. S. 589, 595, 596–597 (1931):

> Property rights must yield provisionally to governmental need. * * * Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. * * * Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied.

Courts of equity may very properly go farther to protect the public interest than they are accustomed to go where private interests only are involved. *Virginian Railway Co.* v. *System Federation etc.,* 300 U.

S. 515, 552 (1937); *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U. S. 4, 15 (1942).

In the circumstances, it cannot be said that appellants have been deprived of due process. The Congress has deemed it essential in the public interest that they comply first and litigate afterward, and there is nothing new or unusual in this. *United States* v. *Slobodkin, supra.*

Litigation under the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. A. Appendix Sec. 924 (d)) has presented the same question now before the Court. That act provides for an administrative determination of protests by persons subject to any regulation issued under the Act, and for a judicial review by the Emergency Court of Appeals of any ruling denying such protests in whole or in part. Decisions of the Emergency Court of Appeals may be reviewed by the Supreme Court on certiorari. The jurisdiction of the Emergency Court of Appeals and of the Supreme Court is exclusive. All other courts, Federal or State, are deprived of jurisdiction to consider the validity or enjoin the operation of the Act or any price regulation issued under it. These provisions have been held to be within the competence of Congress, and consistent with due process of law. *Lockerty* v. *Phillips,* — U. S. —, 63 S. Ct. 1019 (1943).

In the *Lockerty* case, the Court affirmed a judgment of the District Court of the United States for the District of New Jersey dismissing an action to restrain criminal prosecution of a merchant subject to the provisions of a price regulation. The Court observed

that "* * * the constitutional validity of the Act, and of orders and regulations under it, may be determined upon the prescribed review in the Emergency Court." The Court stated also that it had no occasion to consider "whether, or to what extent, appellants may challenge the constitutionality of the Act or the regulation in courts other than the Emergency Court, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations issued under it." However, the several District Courts in which the question has arisen have taken the view that the Act validly restricts the issue which may be raised in enforcement proceedings, civil or criminal, to the simple fact of violation of the regulation. *United States* v. *Slobodkin,* 48 F. Supp. 913 (D. Mass. 1943); *United States* v. *C. Thomas Stores,* 49 F. Supp. 111 (D. Minn. 1943); *Henderson* v. *Kimmel,* 47 F. Supp. 635 (D. Kan. 1942).

From appellants' statement of the question involved, and elsewhere in their brief, the erroneous impression may be gained that the trial court refused to consider whether the order was unconstitutional on its face. In the pretrial proceedings, of which no full record was kept, the District Court indicated that it would not consider any question of constitutionality except the question whether the order was on its face unconstitutional, and, in fact, the trial was conducted on this basis (R. 132, 147). However, appellants made no effort to show that the order was on its face unconstitu-

tional, but sought, through the introduction of evidence, to show the unconstitutionality of the order in its application to them. It is apparent from a colloquy between the Court and counsel for appellants (R. 242) that the latter has misconceived the import of the phrase "unconstitutional on its face," which means that the unconstitutionality of a law or regulation is demonstrable without the introduction of evidence. *Smith* v. *Cahoon,* 283 U. S. 553, 562–563 (1931); *Lovell* v. *City of Griffin,* 303 U. S. 444, 451–453 (1938).

II. Even if the trial court erred in refusing to consider or admit evidence to prove the special defenses, the error was not prejudicial

It is well established that if evidence erroneously excluded in the trial court is insufficient, together with the other evidence in the case, to make out the case contended for by the appellants, the error will not be deemed prejudicial, and the decision of the trial court will nevertheless be affirmed. This, of course, is true only where, as in the case at bar, appellants have made a full proffer and the record shows clearly the nature of the evidence excluded. *Gregg* v. *Moss,* 81 U. S. 564 (1871); *Ivinson* v. *Hutton,* 119 U. S. 604 (1887); *Chicago and Northwestern Railway Company* v. *Gray,* 237 U. S. 399 (1915); *Corrigan* v. *United States,* 82 F. (2d) 106 (C. C. A. (9th) 1936).

The allegations of the special defenses and the evidence proffered in support thereof may be classified roughly as follows: (1) the attempt to establish that from an economic standpoint the lemon order is un-

necessary and inappropriate; (2) the attempt to show that the order discriminates against appellants; and (3) the attempt to show that the order deprives appellants of their property without due process of law.

A. The necessity and appropriateness of the lemon order is not a matter of judicial concern

Insofar as the evidence proffered in support of the special defenses attempts to establish the economic unwisdom of the order, the Court is called upon to decide a dispute wich falls within the legislative rather than the judicial pale. As said in *United States* v. *Morgan,* 313 U. S. 409, 417 (1941):

> This is a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation. On ultimate analysis the real question is whether the Secretary or a court should make an appraisal of elements having a delusive certainty. Congress has put the responsibility on the Secretary, and the Constitution does not deny the assignment.

In a similar vein, the Supreme Court, in *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 394 (1940), said:

> But appellant claims that this Act is not an appropriate exercise of the Congressional power. It urges * * *; that the ills of the industry are attributable to overproduction; that the increase of prices will cause a further loss of markets and add to the afflictions which beset the industry; and that the consuming public will be deprived of the wholesome restriction of the anti-trust laws. Those matters, however, relate

> to questions of policy, to the wisdom of the legislation, and to the appropriateness of the remedy chosen—matters which are not our concern. If we endeavored to appraise them we would be trespassing on the legislative domain.

Congress has provided generally in the Act for volume proration as a method of attaining orderly marketing of fruits in the effectuation of the declared policy of the Act. It has directed the Secretary to determine the need for such proration in particular instances. Following the direction, the Secretary has issued many other orders, some of which embody proration and are otherwise very similar to the lemon order. Since 1935 oranges and grapefruit produced in California and Arizona have been marketed under such an order. This order has been sustained consistently by the District Courts against almost every conceivable attack, including those attacks pressed here against the lemon order, and has been held valid by this Court. *Edwards* v. *United States,* 91 F. (2d) 767 (C. C. A. (9th) 1937); *American Fruit Growers* v. *United States,* 105 F. (2d) 722 (C. C. A. (9th) 1939). See also *Wallace* v. *Hudson-Duncan & Co.,* 98 F. (2d) 985 (C. C. A. (9th) 1938), involving a walnut order issued under the Act.

B. The lemon order does not discriminate against appellants

The appellants urge that the lemon order is not in accordance with law because it discriminates against them. In support of their claim, appellants offered considerable evidence tending to show their

lack of sufficient storage facilities to operate efficiently under the regulation; their inability, under the regulation, to fill the orders received by them for lemons; and the necessity for them, under the order, because of the types of lemons handled by them, to dispose of a large proportion of their fruit for by-product purposes.

In his decision on this point in the proceedings on the petition filed in behalf of appellants and others under Section 8c (15) (A) of the Act (R. 71), the Secretary of Agriculture said:

> "Discrimination" need not be here defined. It is not amiss, however, to note that the essence of "discrimination" is the act of treating one differently from another.[29] "Unlawful" or "unjust" discrimination implies not only different treatment, but different treatment without reference to reasonable distinctions or substantial differences between the persons concerned, arbitrary selection from among persons under like or similar conditions.[30] The petitioners have been proficient in disclosing their own situation. They have not shown, however, either that their hardships under the order are not matched by the hardships of others subject to the regulation, or that (if it exists) the difference in treatment of which

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[29] *Hocking Valley Ry. Co.* v. *United States* (*C. C. A.* 6th 1914) 210 Fed. 735, 740; *Wimberly* v. *Georgia So. & F. Ry. Co.* (Ga. 1908) 63 S. E. 29, 31; 27 C. J. S. Discrimination.

[30] See *Franchise Motor Freight Ass'n.* v. *Seavey* (Calif. 1925) 235 Pac. 1000, *Lindenburg* v. *American Ry. Express Co.* (W. Va. 1921) 106 S. E. 884, 886.

they complain is not founded upon reasonable distinctions and substantial differences validly recognized by the order. In so failing, the petitioners have not built a record upon which any except legally ineffectual findings could be based and have failed, therefore, to carry the burden which is theirs of bringing this proceeding to the stage at which facts can be found. It is, of course, an unavoidable result, if not a stated purpose of regulation, that persons regulated are not free to carry on their activities as they wish and as they conceive to be desirable. That this is true with respect to the petitioners may be freely conceded without, in any manner, reflecting upon the validity of the regulation.

But if the petitioners had here crossed the threshold in their attempt to show discrimination in the operation of the order, there is another aspect of the case which would deny the requested relief. Prorate bases and allotments under the order are derived from a count of lemons "available for current shipment."[31] The computation of such lemons includes a computation of the quantity of fruit which has been picked and assembled at an established shipping point or, under section 953.4 (d) (5) of the order, if facilities for such assembling are unavailable, of lemons which are not so picked and assembled, but which are nevertheless available for current shipment. Lemons in storage, of course, normally qualify as lemons picked from the trees and assembled at an established shipping point and are, therefore,

[31] Section 953.4 (d) (2) and (3) of the order.

usually considered in the computation of the quantity of lemons available for current shipment. But if a handler lacks facilities for storing or otherwise assembling lemons—a claim which the petitioners make with respect to themselves—he may apply, under section 953.4 (d) (5), for the alternative computation, the so-called "tree-count" of lemons. It is, of course, one of the specific duties of the Lemon Administrative Committee to make such an alternative computation if assembling facilities are not available. Any handler who is dissatisfied with the computation of his available lemons, either because he believes the computation erroneous or because he feels himself aggrieved by the Committee's refusal to make a "tree-count", may, under section 953.4 (d) (10) of the order, appeal to the Secretary for a recomputation. The record indicates that one of the petitioners [not one of the appellants herein] has applied for and received a computation of available lemons under the "tree-count" provision of the order. The record does not indicate that the other petitioners have applied for or received such computations of their available lemons. In any event, it appears that none of the petitioners has appealed, under the applicable section of the order, from a computation of lemons made by the Lemon Administrative Committee. *Agricultural Decisions, Secretary of Agriculture,* A. D. 68 (1942).

The question of discrimination in the sense of classification has been held by the Supreme Court to be one peculiarly for legislative or administrative determina-

tion. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304 (1937). The same principle should be applied to the classification of tree ripe lemons with all other lemons in the order. A question closely analogous to the question of classification raised herein was presented for decision in *New York State Guernsey Breeders' Cooperative, Inc.* v. *Wickard* (N. D. N. Y. Jan. 4, 1943, Civil No. 79). There it was asserted that milk produced by Guernsey cows was so different in quality from milk produced by ordinary breeds that it was essentially a different commodity and should be treated as such in the milk order. In its decision, the Court refused to disturb the Secretary's classification, regarding the question as one peculiarly within the province of the Secretary. Unlike the Fourteenth Amendment to the Constitution, the Fifth Amendment contains no equal protection clause and provides no guarantee against discriminatory federal regulation. *Detroit Bank* v. *United States,* — U. S. —, 63 S. Ct. 297, 301 (1943); *Currin* v. *Wallace,* 306 U. S. 1, 13–14 (1939); *Sunshine Coal Company* v. *Adkins,* 310 U. S. 381, 400, 401 (1940). Even if discriminatory regulation may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment, no such case is presented here. See *Detroit Bank* v. *United States, supra.*

C. The lemon order does not take appellant's property without due process of law

In the special defenses and the proffered evidence, appellants emphasized their lack of adequate storage facilities and the costliness of expanding such facilities as they have to meet the requirements of operations

under the order. They also offered evidence to show that the order prevents them from filling all their contracts and orders for the sale of lemons. These facts, if true, indicate the probable extent of the impact of the regulation upon appellants' businesses, but do not support the contention that their constitutional rights are invaded.

In *Mulford* v. *Smith,* 307 U. S. 38 (1939), the sale of tobacco in excess of the farm quota was subject to a penalty prescribed by the Agricultural Adjustment Act of 1938 (7 U. S. C. 1940 ed. 1281 et seq.). The producers contended that the restriction on the sale of their excess tobacco amounted to the taking of their property without due process of law. The record showed that flue-cured tobacco is practically a perishable commodity in the form in which it is harvested and sold by the farmer; that before it can be stored it must be subjected to a re-drying process; that there were no re-drying plants available to the complaining tobacco growers in Georgia and that the cost of constructing re-drying plants was prohibitive in their case. The Supreme Court, at page 51, said:

> The Act did not prevent any producer from holding over the excess tobacco produced, or processing and storing it for sale in a later year; and the circumstances that the producers in Georgia and Florida had not provided facilities for these purposes is not of legal significance.

Similarly, here, the fact that the appellants have not provided facilities for storage of lemons "is not of legal significance."

The contention that the curtailment of appellants' rights to contract with respect to their property violates the due process clause of the Fifth Amendment, is clearly without merit. The same contention has been made in cases involving other orders issued under the Act and has been consistently rejected by the courts. This precise point was made in *Whittenburg* v. *United States,* 100 F. (2d) 520 (C. C. A. (5th) 1939). There the order prohibited the shipment of grapefruit of poor quality, or of small sizes even though of good quality. It was shown, as here, that the handlers had large orders for these small sizes; that they were independent packers not having the facilities of a large cooperative association for disposing of the small sizes advantageously; that their method of doing business was to buy all of the fruit in a particular orchard and, necessarily, they had to take and pay for all of the small fruit as well as the large fruit.

On this feature of the case the court said, at page 523:

> The appellants had some small and inferior grapefruits for which they had a sale but were forbidden to ship them in interstate commerce during the time covered by the weekly orders. They bought them while the law was in force. The Secretary's orders did not confiscate them. The owners could sell them for use in the State if the State law permits, extract the juice, or use them otherwise than to glut the market by shipping them interstate or to Canada. Their liberty to make a desired use of them was for the public good suspended for

> a time, but their property was not taken. It is said they dare not buy grapefruit in the face of the law and so their liberty of contract, which is a form of property, is destroyed. But in fact they may buy all they wish, subject to the public right not to have the market upset with them. Such collisions between private right and exertions of police power for the public good result generally in the prevalence of the public good. Liberty and property have always been qualified by the ancient maxim: Sic Utere tuo ut alienum non laedas. This Act requires notice to and hearing of those to be affected before the Secretary makes his orders, and for a judicial review thereof. Hearing was afforded in this case. Liberty and property have not been taken without due process of law.

In *Wallace* v. *Hudson-Duncan & Co.,* 98 F. (2d) 985 (C. C. A. (9th) 1938), a walnut order issued under the Act, and particularly those provisions requiring the delivery to the agency administering the order of a specified percentage of the quantity of walnuts handled in interstate commerce, or the equivalent cash value, was challenged as taking property without due process of law. This Court rejected the contention, stating at page 989:

> This is not a case of the "taking" of property within the meaning of the last clause of the Fifth Amendment. There is no direct appropriation of property from the Company. *Omnia Commercial Co.* v. *U. S.,* 261 U. S. 502, 508 et seq., 43 S. Ct. 437 et seq., 67 L. Ed. 773, and cases cited. The Order contains no absolute requirement of the delivery of walnuts to

> the Control Board. The requirement is a conditional one. If the Company chooses not to comply with the interstate requirements of the Order, it may nevertheless retain all its walnuts intrastate and dispose of them to intrastate buyers.

The lemon order does not contain any requirements for the delivery of lemons or the equivalent value to any governmental agency. The form of regulation applied here—volume proration—is far milder in its application. In fact, it was argued in the *Hudson-Duncan* case that volume proration or a quota system would be wholly unobjectionable and would raise no question under the due process clause, and therefore, should have been adopted by the Secretary in the walnut order.

In substance, the appellants' main complaint is that they are being deprived by the lemon order of a comparatively favorable position in the lemon industry, for they have always been able to dispose of all their merchantable lemons in fresh fruit channels, when most other handlers often could not. The order distributes the current demand for lemons among all handlers in proportion to the supply each may have currently available. In other words, a principle of equalization is at work. Judge Bryant's words in *New York State Guernsey Breeders' Cooperative, Inc.* v. *Wickard* (N. D. N. Y. Jan. 4, 1943, Civil No. 79) aptly answer appellants' complaint on this score:

> Concededly, plaintiff was and is a handler of milk as defined in Order 27. Concededly, its producers have been injured by the Order. The

same can be said of all other producers who, at the time of the making of the Order, had a Class I Market. The purpose was to stabilize the industry through division of the benefits of this particular market between the possessors and nonpossessors. The principle of equalization embodied in this very order was fully considered and held constitutional by the Supreme Court in *U. S.* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533. In fact practically every feature of the order was therein considered. The injury caused by equalization alone is not a basis of attack.

III. Conclusion

It is respectfully submitted that the judgments of the District Court should be affirmed.

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